No. 83-913

In The

Supreme Court of the United States

OCTOBER TERM, 1983

KAY ANN KROGUL,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition For A Writ Of Certiorari To The
Appellate Court Of Illinois, Second Judicial District

REPLY TO RESPONDENT'S
BRIEF IN OPPOSITION

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The brief of the State of Illinois so shockingly fails to meet Petitioner's argument as to practically constitute a confession of error. Nevertheless, some remarks are necessary.

The State refuses to acknowledge that the Illinois versions of "murder" and "voluntary manslaughter" *bear no relation* to "common law murder" and "common law voluntary manslaughter." At common law, murder contained "malice aforethought"; voluntary manslaughter was basically "murder minus malice aforethought." The Illinois Criminal Code of 1961, however, totally departed from these common law definitions by abolishing the concept

of "malice aforethought." *See* Ill. Rev. Stat. ch. 38, par. 9-1 (1981) (Committee Comments). In Illinois, murder is the intentional or knowing killing of a human being without justification. Ill. Rev. Stat. ch. 38, par. 9-1 (1981) What Illinois refers to as "voluntary manslaughter" is composed of murder—*i.e.*, the intentional or knowing killing of a human being without justification—*plus* certain mitigating circumstances. Ill. Rev. Stat. ch. 38, par. 9-2 (1981). *See* O'Neill, *"With Malice Toward None": A Solution To An Illinois Homicide Quandary*, 32 DePaul L.R. 107 (1982); Haddad, *Allocation Of Burdens In Murder—Voluntary Manslaughter Cases: An Affirmative Defense Approach*, 59 Chicago Kent L.R. 23, 26-31 (1982). Illinois courts, although slow to grasp the distinction, are beginning to recognize this. *See People v. Minnis*, 118 Ill.App. 3d 345, 360-361, 455 N.E.2d 209, 220-221 (1983).

In the case at bar, the jury acquitted Petitioner on the Illinois version of murder and was "hung" on the Illinois version of voluntary manslaughter. Obviously, the State is precluded from retrying Petitioner for Illinois voluntary manslaughter. This is because at a second trial the State would first have to prove all the elements of Illinois murder; since Petitioner has already been acquitted of this charge, double jeopardy forbids a retrial. *Brown v. Ohio*, 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977).[1]

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[1] Petitioner re-emphasizes that the jury's verdicts in this case were logically inconsistent; in Illinois an acquittal on murder is *a fortiori* an acquittal on voluntary manslaughter. These contradictory verdicts were caused by the thoroughly inept Illinois Pattern Jury Instructions tendered in this and every murder/voluntary manslaughter case in Illinois. *See* O'Neill, *supra*, pp. 118-123. For double jeopardy purposes, the relevant fact is that the jury acquitted on murder and judgment was entered on that verdict. (C. 72)

Obviously, the result is *totally different* in a common law jurisdiction. There, an acquittal on common law murder and a hung jury on common law voluntary manslaughter in no way precludes a second trial for common law voluntary manslaughter. That is because the jury's acquittal on common law murder merely shows that the unjustified homicide was not accompanied by "malice aforethought." Surely such a verdict does not preclude a conviction for common law voluntary manslaughter, for which no showing of "malice aforethought" is necessary. A second trial for common law voluntary manslaughter would be entirely proper. *United States v. Gooday*, 710 F.2d 80 (9th Cir. 1983).

The case at bar, however, is no different from a situation in which a defendant is tried for armed robbery and robbery arising out of one alleged incident. Assume a jury acquits defendant of robbery and is "hung" on the armed robbery charge; a judgment of acquittal is entered on the robbery charge. Putting aside the logical inconsistency of the verdicts, it is clear that defendant cannot be retried for armed robbery; the acquittal for robbery precludes a conviction for armed robbery.

The case at bar is exactly the same. In Illinois, "voluntary manslaughter" is no more than murder *plus* mitigating circumstances. Therefore, Petitioner's acquittal on murder precludes a second trial for voluntary manslaughter.

Petitioner urges this Court to consider the serious double jeopardy problems involved in this case. Petitioner reiterates that this case is well suited for a summary decision on the merits without the necessity of briefing and oral argument.

CONCLUSION

For these reasons, Petitioner respectfully asks this Court to grant this petition and reverse the decision of the Appellate Court of Illinois, Second District.

Respectfully submitted,

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